EUROPEAN COMMITTEE OF SOCIAL RIGHTS
COMITE EUROPEEN DES DROITS SOCIAUX

COUNCIL OF EUROPE CONSEIL DE L'EUROPE

28 May 2009

Case document no. 1

Confédération française de l'Encadrement – Confédération générale des Cadres (CFE-CGC) v. France
Complaint no. 56/2009

COMPLAINT

(TRANSLATION)

registered at the Secretariat on 4 May 2009

Application to find a violation
of the revised European Social Charter

Secretariat of the European Social Charter

European Committee of Social Rights

I. The parties

The Applicant:

The Confederation Française de L'encadrement - Confederation Generale des Cadres (CFE-CGC) (French managers' trade union confederation), 59-63 rue du Rocher, 75008 Paris (France), represented by its President, Mr Bernard Van Craeynest, same address

Represented by Jean-Jacques Gatineau and Carole FATTACCINI, lawyers at the Conseil d'Etat *and the Court of Cassation, 18 avenue Friedland 75008 Paris (France)*

The high contracting party

France

II. Background to the complaint and the facts of the case

The Reform of Social Democracy and Working Hours Act (no. 2008-789 of 20 August 2008) was signed by the French President on 20 August 2008 and published in the official bulletin on 21 August 2008 (appendix 1).

As its title indicates, there are two aspects to this legislation: social democracy, which is the subject of part 1, and working hours, which are the subject of part 2.

The working hours part follows a number of successive reduced working time laws starting with the so-called Aubry Act of 13 June 1998, which was subsequently relaxed by the Aubry II Act of 19 January 2000 and, following the change of majority, the Fillon II Act of 17 January 2003.

Following the introduction of the 35 hour week, the Aubry II and Fillon II acts made a number of changes to managers' working time arrangements.

Until recently, the French Labour Code identified three categories of managers:

- Senior managers, who were excluded from the scope of the working hours legislation because of their operational autonomy, the powers they exercised within the business and their high rate of remuneration.

- Integrated managers, whose work patterns were similar to those of non-managerial employees and who were therefore subject to the same working hours arrangements as them.

- Intermediate managers, who had greater operational autonomy than integrated managers but less than that of senior managers.

For this third category of managers, the legislation introduced the annual days worked (*forfait-jours*) system, which restricted time worked to a maximum number of days in the year, with no reference to a maximum number of hours worked in the day or week. Under the Aubry II Act, the maximum number of days worked was 217, which Fillon II raised to 218.

The European Committee of Social Rights then found that these working time arrangements for intermediate managers were incompatible with the revised Social Charter of 5 March 1998.

Very surprisingly, in view of the seriousness and repeated nature of the breaches identified, the Council of Europe's Committee of Ministers took note of the report of the European Committee of Social Rights, in Resolution ResChS(2005)7, but did not consider it necessary to issue a recommendation to France on the subject.

Therefore, despite two adverse decisions of the European Committee, France has never deemed it necessary to revise its legislation to bring it into line with the revised Social Charter.

For example, in the version in force since the new codification and the publication of the disputed Act of 20 August 2008, the maximum has been raised, in the absence of a collective agreement and therefore on a purely non-binding basis, to 235 days a year.

Moreover, the legislation greatly extended the scope of the annual days worked system, which is now no longer confined to the intermediate managers category of employees, as defined in the previous act.

The new Article L. 3121-43 of the Labour Code (Section 19 of the Act of 20 August 2003) authorises annual days worked agreements for:

"managers who have a degree of control over their own work schedules and whose duties do not require them to work the standard working hours applicable to their individual work place, department or team". These are all designated as "autonomous managers", and in practice constitute the majority of managers in France;

- "employees whose working hours cannot be determined in advance and who have complete independence to organise their work schedules so that they can perform the duties entrusted to them."

In accordance with Article 61 of the French Constitution of 4 October 1958, two groups of members of parliament, from the lower house and the Senate, referred the legislation to the Constitutional Court in the period prior to its official proclamation. The latter censured certain of the working time provisions, which were then withdrawn from the legislation before it came into force.

Nevertheless, most of the Act was unjustly deemed to be constitutional, with the result that it is currently impossible to challenge its constitutionality in the domestic courts.

In addition to the manifestly unconstitutional provisions that can no longer be challenged, the legislation contains aspects that are in serious breach of the revised Social Charter.

Thus, in so far as it confirms and strengthens the annual days worked system and extends its scope, it is manifestly in breach of articles 1, 2, 3, 4, 20 and 27 of the revised Social Charter, and of Part V, which embodies the principle of non-discrimination.

III. The admissibility of the complaint

The complainant trade union first wishes to show that the European Committee of Social Rights has jurisdiction to hear its complaint.

On 5 May 1949, France was one of the Council of Europe's founder members.

On 7 May 1999, France ratified the revised Social Charter of 5 March 1998 with no reservations (appendix 2) and is therefore bound by all its articles.

On the same date it also ratified the additional Protocol of 9 November 1995 providing for a system of collective complaints. The purpose of the protocol is to strengthen oversight of member states by means of a collective complaints system that is more effective than one based solely on annual reports prepared and submitted by the states party.

The two conventions came into force on 1 July 1999.

Since that date, therefore, it has been possible to submit complaints to the European Committee of Social Rights.

Article 1 c of the additional Protocol authorises "representative national organisations of employers and trade unions within the jurisdiction of the Contracting Party against which they have lodged a complaint" to submit complaints alleging unsatisfactory application of the Charter.

It therefore grants representative trade unions the right to bring complaints before the European Committee of Social Rights.

Rules 23 and 24 of the Rules of the European Committee of Social Rights, adopted on 29 March 2004 and revised on 12 May 2005, state that complaints shall be addressed to the Executive Secretary acting on behalf of the Secretary General of the Council of Europe, submitted in one of the official languages of the Council of Europe and signed by the person(s) with the competence to represent the complainant organisation.

With regard to applications for compensation, the European Committee of Social Rights has consistently and appropriately taken the view that although "the Protocol does not regulate the issue of compensation for expenses incurred in connection with complaints .... as a consequence of the quasi-judicial nature of the proceedings under the Protocol in case of a finding of a violation of the Charter, the defending state should meet at least some of the costs incurred" (see, in particular, decision 16/2003 of 12 October 2004).

The complainant, the CFE-CGC, is undoubtedly a representative trade union at national level and satisfies the conditions in Article 1 c of the Protocol.

The Committee has always declared admissible complaints submitted by the CFE-CGC, which is thus clearly recognised as being qualified to do so (see the Committee's decisions of 9 November 2000 on complaint 9/2000 and 16 June 2003 on complaint 16/2003).

This complaint is signed by Mr Bernard Van Craeynest, whom the organisation's articles of association authorise to act on its behalf (appendix no. 3).

From all standpoints, therefore, the complaint is admissible.

IV. The violations of the Charter

The Act of 20 August 2008 extended the annual days worked system to a wider category of employees and increased the maximum annual days to be worked to 235, in the absence of a collective agreement.

These provisions, which aggravate the defects of a days worked system that the European Committee has already found to be incompatible with the revised Social Charter (see its decisions of 9 November 2000 on complaint 9/2000 and 16 June 2003 on complaint 16/2003), are once more incompatible with articles 1, 2, 3, 4, 20 and 27 of the revised Charter and Part V on non-discrimination.

1. The violation of Article 1 of the revised Charter, requiring parties to make full employment a primary aim

Article 1 of the revised Charter reads:

"With a view to ensuring the effective exercise of the right to work, the Parties undertake:

1. to accept as one of their primary aims and responsibilities the achievement and maintenance of as high and stable a level of employment as possible, with a view to the attainment of full employment; ..."

Clearly, aside from any policy statements and would-be job creation measures, whether or not states party have satisfied their obligation to make full employment a primary aim has to be judged by the impact such measures actually have on employment.

The effect of the Act of 20 August 2008 is to ensure that the employees concerned, in particular autonomous managers, spend more time at work to meet, as far as possible, their employers' requirements for certain tasks to be carried out.

The clearly stated purpose of the new legislation reflects the famous campaign slogan of the head of state: "work more to earn more". There is nothing shocking as such in the idea of relaxing the rules governing employment to enable those who so wish to work more in order to earn more, but it totally conflicts with the aim of achieving full employment embodied in Article 1§1 of the Charter.

Advanced statistical studies co-ordinated by leading experts have established beyond doubt that increasing employees' workload has a negative impact on employment. A study carried out by the OFCE (French economic monitoring centre, part of the economic research centre of Science-Po, a major higher education institute in Paris) concludes that this flagship programme of Nicolas Sarkozy will result in the loss of 75 000 jobs over five years (see appendix 4, La Tribune, *Défiscaliser les heures supplémentaires: quelle efficacité pour la croissance?* (tax relief on overtime: what effect on growth?), interview with Eric Heyer, deputy director of the OFCE).

The opposite hypothesis, which tries to maintain that increasing employees' workload leads to higher employment is based on arguments that are both abstract and ludicrous, namely that increasing their working week will automatically cause a rise in their earnings and thus their purchasing power, meaning a rise in consumption, growth ... and therefore employment!

This highly dogmatic application of the liberal virtuous spiral theory signally fails to stand up to the realities of the labour market. For example, as will be shown later, the application of the annual days worked system means that no payment is made for overtime worked (see section 4). Moreover, overtime is very frequently neither counted nor recompensed. The number of additional hours worked that are not counted and for which no payment is made is difficult to establish but numerous observers estimate it at several tens of billions each year.

The government has nevertheless sought to save face by introducing an apparent incentive to ensure that employees are paid for overtime worked, in the form of the abolition of social charges and taxes on such overtime.

Let there be no illusions.

There is no way that this incentive will be sufficient to ensure the payment of overtime. It is difficult to see why, in the absence of any supervisory arrangements and effective constraints, employers should be any more likely in the future to declare and recompense their employees' overtime than they have been in the past.

In fact it is unnecessary to dwell on theoretical arguments and hypotheses when the facts speak for themselves. There was a significant fall in employment during the period – the third quarter of 2008 - when the new provisions were being introduced, and this should be confirmed by the forthcoming figures for the fourth quarter.

Leading observers have noted that during the third quarter of 2008, the country lost 36 500 jobs, a fall of 0.2% over the previous quarter (appendix 5: DARES, December 2008, no. 51.2, *L'emploi salarié au troisième trimestre 2008).*

Meanwhile INSEE (the national economics and statistics institute) reports a general increase in unemployment over the period in question (appendix 6: INSEE conjoncture, informations rapides, 4 December 2008 no. 324).

These analyses and conclusions are highly convincing.

Thus, by encouraging employers to make more use of existing employees rather than recruiting new ones to meet their needs, the legislation is not in any way concerned with securing full employment.

For this reason alone, France is clearly in breach of the Charter.

2. The violation of Article 2 of the revised Charter, on just conditions of work

Article 2 of the revised European Social Charter states that:

"With a view to ensuring the effective exercise of the right to just conditions of work, the Parties undertake:
1. to provide for reasonable daily and weekly working hours, the working week to be progressively reduced to the extent that the increase of productivity and other relevant factors permit; ..."

This article has two elements, namely the requirement for reasonable working hours and the obligation to reduce progressively the working week.

A. The unreasonable nature of the working hours provisions

In its aforementioned decisions of 9 November 2000 and 16 June 2003 on the complaints concerning the Aubry II and Fillon II acts, the European Committee did not object to the actual principle of flexible working time measures but did lay down strict conditions for such measures to be compatible with the Charter.

For example, flexible working time measures must:

"prevent unreasonable daily and weekly working time ... operate within a legal framework providing adequate guarantees ... [and] provide for reasonable reference periods for the calculation of average working time".

a. *The unreasonable nature of the daily or weekly working hours*

In connection with weekly working hours, in both decisions the Committee considered that 78 hours was "manifestly excessive and therefore cannot be considered reasonable within the meaning of Article 2§1 of the revised Social Charter".

However, it considered that a maximum of 13 hours in a day was not unreasonable within the meaning of Article 2§1.

We cannot agree with this. If it is accepted that 13 hours worked in a day is not unreasonable, this can only be on a very occasional basis. The generally held medical and sociological opinion is that an employee's personal well-being requires a reasonable balance between work, rest and leisure time. The so-called "Owen's law" established the principle of eight hours labour, eight hours recreation, eight hours rest. While such a radical approach may not be reasonable, some such balance remains crucial for personal development. The section concerned with safeguarding employees' health will argue that a working day that lasts more than twelve hours destroys this critical balance (see section 3).

In the absence, therefore, of particular circumstances to justify it and guaranteed arrangements for ensuring compensatory time off, a thirteen hour working day, which is more than half the full day, is to say the least unreasonable.

The Aubry II and Fillon II acts, and now the current legislation, have thus established an annual days worked system that enables employers to require those concerned to work, and then to pay them on the basis of days worked, with no reference to the number of daily or weekly hours worked.

French legal theory has criticised this total fungibility and monetarisation of work (Prof. F. Favennec-Héry, *Réforme du temps de travail - loi n°2008-789 du 20 août 2008,* Semaine Juridique Sociale no. 37, 9 September 2008, 1461). It is clear that the contested legislation, and the political views emanating from the head of state on which it is based, are in no way concerned with ensuring reasonable working hours or reducing working time but rather with removing any limits to hours worked.

Two statements made by the President during a speech and at a press conference provide clear evidence of this:

"Companies must be freed from the straitjacket of rules that limit and prevent the use of overtime."

"We need to go further by simplifying certain aspects of our labour regulations, which are among the most complex in the world."

Against this background, the only restrictions that can be imposed on employers are ones based on the general rules governing all employment relationships.

These appear in articles L.3131-1 and L. 3132-1 of the Labour Code, which establish, respectively, a minimum daily rest period of eleven hours and a maximum of six days worked in the week.

Subject to these conditions, the employees concerned by the current legislation can work:

- 24 - 11 = 13 hours per day
- and 13 x 6 = 78 hours per week

The Committee has already found that a 78 hour working week is unreasonable. For the reasons cited, a 13 hour working day must also be regarded as unreasonable.

Since it does not prevent such unreasonable working days and weeks, the legislation in question does not satisfy this first condition.

b. *The absence of a legal framework providing adequate guarantees*

The Committee's aforementioned decision of 16 June 2003 said that to be compatible with the Charter:

"flexible working time schemes should operate in a precise legal framework which clearly delimits employers' and employees' room for manoeuvre in relation to any amendment, by collective agreement, of working time".

The Committee thereby acknowledges the right to collective bargaining, which has constitutional protection in most of the member states, but insists that the legal framework governing the organisation of flexible working hours systems cannot be determined solely by collective agreements.

This requirement for formal statutory rules on working time derives from the inherent economic imbalance in the employer–employee relationship, which means that in a state governed by the rule of law employment relationships cannot be solely the province of collective agreements.

Thus, the Committee ruled that the Fillon II Act was incompatible with Article 2§1 of the Charter because "the annual working days system can only be adopted on the basis of collective agreements". These arrangements even devolved to the social partners responsibility for laying down "the procedures to monitor the working time of the managerial staff concerned, especially their daily working time and their workload".

According to the Committee, these matters were mainly left to enterprise-level agreements, a practice that offered quite inadequate safeguards.

By relinquishing all jurisdiction in this area, the authorities quite unacceptably renounced all responsibility for protecting the employees concerned. The same applies to the disputed provisions of the Act of 20 August 2008.

The Labour Code, as amended by this act, now reads:

Art. L. 3121-44: *"The number of annual working days set by the collective agreement provided for in Article L.3121-39 may not exceed two hundred and eighteen days."*

Art. L. 3121-45: *"Employees who so wish may, in agreement with their employers, forfeit some of their rest days in exchange for an increase in their salaries. The agreement between the employee and the employer shall be in writing.*

The number of annual working days may not exceed a maximum set by the collective agreement provided for in Article L.3121-39. If there is no such agreement, the maximum shall be two hundred and thirty five days".

Article L. 3121-39 reads: *"individual agreements on annual hours or weeks worked shall be reached by enterprise or plant-level agreements or, failing that, by industry agreements.These prior collective agreements shall determine to which categories of employees individual agreements on annual hours or weeks should apply, the number of annual working hours or days on which the system is based, and the main characteristics of these agreements."*

It should be noted that, like Fillon II, the legislation places no restrictions on the organisation of working time, and that the organisation of such working time arrangements is left first and foremost to enterprise or plant-level agreements.

Far from offering the safeguards that are usually deemed to be inherent in the collective bargaining process, this transfer of responsibilities in fact exposes them to the risk of a quasi-unilateral imposition of extreme working time conditions.

It cannot be argued that the contested arrangements will necessarily result in grossly excessive working hours for all the employees concerned. However, since they do create this possibility, there is no doubt that many of them will suffer accordingly.

At all events, the legislation at issue clearly fails to establish any legal framework providing adequate guarantees.

c. *The absence of a reasonable reference period for the calculation of average working time*

A reasonable reference period offers employees a safeguard by providing them with a defence in advance against abnormally intense periods of work over a short time scale even when, over a longer period, the average time worked remains reasonable.

In the aforementioned decision 9/2000, the Committee said that in determining whether flexible working time systems are reasonable it takes account of the length of the reference period.

Moreover, in the general introduction to Conclusions XIV-2 (p. 34) the Committee states that reference periods not exceeding "four to six months are acceptable, and periods of up to a maximum of one year may also be acceptable in exceptional circumstances."

Clearly in this case an annual reference period cannot be considered exceptional given the range and number of employees, particularly managers, to whom these provisions apply.

The current system undoubtedly fails to satisfy this final condition for flexible working time measures to comply with the Charter.

B. Failure to progressively reduce the working week

Article 2§1 requires the working week to be progressively reduced "to the extent that the increase of productivity and other relevant factors permit".

It is generally accepted that France has one of the highest levels of productivity in the world (see Etude FO-Cadres 3 September 2008-11-19 – appendix 7).

Since it also has an extremely high level of unemployment (7.7% of the active population and 2.8 million persons - INSEE figures for the third quarter of 2008, published on 4 December 2008), France is clearly one of the member states on which the Charter places an obligation to progressively reduce working time.

Yet it is obvious that, if not in purpose at least in effect, this measure will increase the working time of the category of persons concerned.

As such, and more generally, in so far as it reverses the progress towards the 35 hour week, it must be deemed to be socially regressive and totally incompatible with Article 2§1 of the Charter.

In every respect then, the disputed provisions are at variance with Article 2§1 of the Charter.

3. The violation of Article 3 safeguarding employees' right to safe and healthy working conditions

Part I of the revised Charter, which prescribes member states' social policy aims, states that:

"All workers have the right to safe and healthy working conditions".

Article 3 reads:

"With a view to ensuring the effective exercise of the right to safe and healthy working conditions, the Parties undertake, in consultation with employers' and workers' organisations:

1. to formulate, implement and periodically review a coherent national policy on occupational safety, occupational health and the working environment. The primary aim of this policy shall be to improve occupational safety and health and to prevent accidents and injury to health arising out of, linked with or occurring in the course of work, particularly by minimising the causes of hazards inherent in the working environment;"

Decision 30/2005 of 6 December 2006 in *Marangopoloulos Foundation for Human Rights (MFHR) v. Greece* shows that these two requirements oblige member states to introduce and apply prevention policies to promote employees' health, and therefore obviously to refrain from applying policies liable to harm their health.

The disputed provisions authorise increases in employees' working hours to an extent that could threaten their health.

Appearances to the contrary, there is no limit to the number of days worked in the year.

For proof, it is merely necessary to refer once more to articles L. 3121-44 and L. 3121-45 of the Labour Code, as amended by section 19 of the new legislation.

Art. L. 3121-44: *"The number of annual working days set by the collective agreement provided for in Article L.3121-39 may not exceed two hundred and eighteen days."*

Art. L. 3121-45: *"Employees who so wish may, in agreement with their employers, forfeit some of their rest days in exchange for an increase in their salaries. The agreement between the employee and the employer shall be in writing. The number of annual working days may not exceed a maximum set by the collective agreement provided for in Article L.3121-39. If there is no such agreement, the maximum shall be two hundred and thirty five days".*

The legislation specifies 218 days as the reference period for annual days worked by the managers and other employees concerned, but these 218 days are far from constituting a maximum.

As a matter of principle, the determination of this maximum is left to negotiations between the social partners.

In the absence, and only in the absence, of such an agreement, the maximum is set at 235 days.

It must therefore be clearly borne in mind that this period of 235 days is not an absolute maximum. There is nothing to prevent a collective agreement, even one reached in an individual firm, from setting the maximum at more than 235.

This means that there are only two types of legal restriction on working time:

Those already referred to in articles L.3131-1 and L.3132-1 of the Labour Code, which establish, respectively, a minimum daily rest period of eleven hours and a maximum of six days worked in the week.

- Those resulting from the mandatory five weeks annual leave.

Over a year, these obligatory rest periods amount to:

25 days of annual leave + 52 days of weekly rest periods = 77 days of the year not worked

As a result, French law now authorises the category of employees concerned by these provisions to work 365 - 77 = 288 days a year.

Since the maximum daily hours worked is 13, employers are now authorised to require certain employees to work 288 days a year and 13 hours a day, in other words (288 x 13 =) 3744 hours a year.

A year comprises 365 x 24 = 8760 hours.

The law therefore now authorises employees to work for (3744 / 8760) x 100 = 42.74% of their time.

Such working conditions are grossly incompatible with any concern for employees' health.

The growing concern about stress at work, which is reported daily in the press and in the various statistical studies on the subject, clearly highlights the seriousness of the problem.

Sociological and medical studies conducted by such leading bodies as the INRS (French national research and safety institute for the prevention of occupational accidents and diseases) and the INPES (French national institute for health prevention and education) have confirmed the harmful effects of stress on health.

These consequences of stress on health may take the form of mental disorders, behavioural disorders such as withdrawal or inhibition, addictive behaviour, such as consumption of tranquilisers or stimulants, emotional symptoms, such as excitability or anxiety attacks, physical symptoms such as sleep disorders or various forms of pain, and psychological symptoms such as depression that may even culminate in suicide.

There is nothing theoretical about suicides linked to occupational stress. There is strong evidence that the recent suicides of certain managers at Renault – three in four months – were linked to pressurised working conditions that had become unbearable. Carlos Ghosn, the managing director of Renault, has himself acknowledged that the group's engineers were subjected to "objectively very high levels of tension", with the result that the firm is now introducing an anti-stress plan (appendices 8 and 9).

More generally, an INRS study concludes that 63% of employees have a highly stressful job and that 27% complain of health problems linked to stress in the workplace (appendix 10).

There are numerous causes of occupational stress but it emerges from research carried out and expert medical opinion that it is the direct consequence of employees', and in particular managers', working conditions. Dominique Huez, an occupational physician, told *Le Monde* (19 September 2008) that the increase in stress in the workplace was linked to current managerial techniques that were highly results oriented (appendix 11).

The joint INRS study identified as stress factors high quantitative requirements and the failure to reconcile working hours with biological rhythms and social and family life.

For more detailed information on the subject, please refer to two studies carried out by the INRS and the INPES (appendices 10 and 12).

In addition, a Norwegian study of a representative sample of employees has shown that, irrespective of sex, those who worked overtime had a "significantly higher risk of suffering anxiety and depression than ones who worked normal hours". The Norwegian study concluded that there was a link between overtime and increased health risks (see Le journal de l'environnement, 23 June 2008, *Les heures sup associées à l'anxiété et la dépression)*.

This analysis was also based on another, this time American, study carried out in 2005 under the supervision of Professor Allard Dembe of the University of Massachusetts and based on a very large sample, which concluded that "working at least 12 hours per day was associated with a 37% increased hazard rate and working at least 60 hours per week was associated with a 23% increased hazard rate".

This applied irrespective of the risks attached to the job and journey to work times (see Le journal de l'environnement, 18 August 2005, *Travailler plus, un facteur de risque).* Both studies are available on the Journal de l'Environnement site, and summaries are appended to this memorial (appendices 13 and 14).

Occupational stress therefore seems to be associated in large measure with a breakdown of the balance between work, rest and leisure.

More particularly, the "stress barometer" published by the complainant in October 2008 shows a deterioration in the quality of life at work since the new legislation came into force.

It appears that between March and October 2008, objectives were increasingly viewed as unrealistic or unattainable, that the tools and other resources necessary to carry out the work were more and more inadequate, that responsibilities were less and less well defined and that efforts made were decreasingly valued at their full worth. Similarly, over the same period managers felt increasingly tense and nervous on account of their work and considered that it was more difficult to reconcile their work with their private lives, which was leading to more anxiety. Others even experienced headaches and migraines. There was a 5% increase in the number who worried about losing their jobs and 2% in the number consulting a psychologist, psychiatrist or psychoanalyst (appendix 15).

Under these circumstances, it is clear that legislation that authorises employers over the space of a year to require their employees to spend 42.74% of their time at work, in the stressful conditions described in the various studies, is not concerned with protecting employees' health.

Once again, the violation of the Charter is unambiguous.

4. The violation of Article 4 on the right to a fair remuneration

Article 4 of the revised European Social Charter states that:

"With a view to ensuring the effective exercise of the right to a fair remuneration, the Parties undertake:

2. to recognise the right of workers to an increased rate of remuneration for overtime work, subject to exceptions in particular cases;"

In its previous decisions in which it found that the Aubry II and Fillon II acts were incompatible with the Charter, the Committee accepted the arguments of the CFE-CGC that the effect of the annual days worked system was to remove any reference period for establishing normal working hours, thus making it impossible to take account of, count and reward overtime worked.

Article 4§2 of the Charter does permit certain exceptions.

According to conclusions IX-2 (p. 38), there could be exceptions for certain categories of public officials or managers, but these categories must be limited in number.

This requirement means that it is not permissible for too extensive a category of employees to be deprived of overtime payments.

Thus, in decision 16/2003, the Committee stated that"

"*the number of intermediate managers concerned and the nature of their duties clearly excludes them from the scope of the exceptions referred to in Article 4§2*".

The current legislation still gives 218 as the number of days beyond which additional payment must be made, but without specifying any reference period in terms of daily, weekly, monthly or even yearly working hours.

In the absence of such a reference period, it is therefore impossible to take account of the overtime worked by the employees covered by the relevant provisions.

France consequently appears to be in continued violation of Article 4 of the Charter.

5. The violation of articles 20 and 27 and Part V combined granting employees the right to non-discrimination

Articles 20 and 27 of the Charter read:

Article 20:

"With a view to ensuring the effective exercise of the right to equal opportunities and equal treatment in matters of employment and occupation without discrimination on the grounds of sex, the Parties undertake to recognise that right and to take appropriate measures to ensure or promote its application in the following fields:

(...)

c. terms of employment and working conditions, including remuneration;

Article 27

"With a view to ensuring the exercise of the right to equality of opportunity and treatment for men and women workers with family responsibilities and between such workers and other workers, the Parties undertake to take appropriate measures:

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a. to enable workers with family responsibilities to enter and remain in employment, as well as to re-enter employment after an absence due to those responsibilities, including measures in the field of vocational guidance and training;

b. to take account of their needs in terms of conditions of employment and social security

(...)

Article E of Part V of the revised Charter reads:

"The enjoyment of the rights set forth in this Charter shall be secured without discrimination on any ground such as race, colour, sex, language, religion, political or

other opinion, national extraction or social origin, health, association with a national minority, birth or other status."

The general principle of non-discrimination has therefore been endorsed and frequently confirmed by the Committee.

For example, in a recent decision dated 3 June 2008 (41/2007) and in that of 4 November 2003 (13/2000) it has clearly stated its approach to equality and non-discrimination:

"*The wording of Article E is almost identical to the wording of Article 14 of the European Convention on Human Rights. As the European Court of Human Rights has repeatedly stressed in interpreting Article 14 and most recently in the Thlimmenos case [Thlimmenos v. Greece [GC], no 34369/97, ECHR 2000-IV, §44)], the principle of equality that is reflected therein means treating equals equally and unequals unequally*."

(Autisme Europe v. France, complaint no. 13/2000, decision on the merits of 4 November 2003, §52).

The legislation of 20 August 2008 establishes unjustified discrimination between employees covered by the annual days worked system and other employees. This applies to both their working time and their right to equal remuneration, with all the associated consequences for their health and respect for their family lives

With regard to their right to reasonable working time, it has been shown that autonomous managers, all those covered by these provisions, may be required quite legally to work up to 288 days a year, with 13 hours a day and 78 hours a week. They may also work up to 3 744 hours a year, with the harmful effects on their health and their family lives already referred to.

The working time of managers and other employees not covered by these provisions is based on the 35 hour week, which means 1 600 hours per year. They may be required to work overtime, but in much more closely controlled conditions.

Once again how many hours of overtime employees can be asked to perform is decided by collective bargaining (new art. L.3121-11 of the Labour Code, section 18 of the Act). If there is no such agreement, the regulation number of annual hours is 220 per employee (decree 2008-1132 of 4 November 2008).

However there is a key difference between employees covered by the annual days worked system and the rest, in the form of compensatory time off for any hours worked in excess of the maximum (new art. L.3121-11 of the Labour Code, section 18 of the Act).

This compensatory time off to which employees not covered by the annual days worked system are entitled has a direct and immediate impact on the number of days they work, which are inevitably fewer than those worked by their colleagues who are covered by that system.

Their compensatory time off enables those employees to re-establish the work-rest-leisure balance that is so essential to their personal development and fulfilment.

While the nature of the work performed may justify more flexible working arrangements for the managers and employees concerned, and thus the application of a different system, there is nothing to justify making them work more hours than other employees.

The same considerations apply with equal force to the right to equal remuneration. As already noted the reference period used to calculate the working time of the managers and other employees concerned by the disputed provisions is based not on number of hours but on days worked in the year, which makes it impossible to determine, and thus pay for, the number of hours of overtime worked.

As well as being in serious breach of Article 4 of the Charter, this system is incompatible with the principle of non-discrimination, since it only applies to certain categories of employee, with no justification whatever.

The arrangements for paying the overtime of employees under the annual days worked system, which come into operation after the 218th day worked in the year and are mainly based on enterprise-level agreements, differ from those applicable to other employees.

For the latter, Article L.3121-22 of the Labour Code provides that:

"Overtime worked in excess of the legal weekly hours specified in Article L. 3121-10, or of the period considered to be the equivalent, shall be paid at an increased rate of 25% for the first eight hours and 50% for the following hours.

A different rate of increase may be specified in an extended industry agreement or in an enterprise or plant-level agreement. This rate may not be less than 10%".

Each hour of overtime worked in excess of 35 hours per week must therefore be paid at a rate that is increased by at least 10%.

Once again, while it is understandable that the nature of the work performed by autonomous managers and other employees justifies alternative working arrangements, nothing - other than intolerable discrimination - can explain why they are not paid, and certainly not at a higher rate, for the work they perform in excess of 35 hours per week.

This constitutes blatant discrimination.

For all these reasons, the contested legal provisions are in breach of the European Social Charter and the present complaint is well-founded in all respects.

V. The purpose of the complaint and the parties' claims for just satisfaction

The Additional Protocol of 9 November 1995 providing for a system of collective complaints and the Committee's Rules of 29 March 2004 have nothing to say on the question of compensation for expenses incurred in connection with collective complaints. However, it is now accepted that because of the quasi-judicial nature of proceedings before the Committee, in the event of a finding that the Charter has been violated the defending state should meet at least some of the costs incurred (decision 16/2003 of 13 October 2004).

In that case the Committee acknowledged the amount of work that had gone into the complaint itself and the subsequent memorials throughout the proceedings.

It should also be noted that although the complainant is not being formally represented by a lawyer in the proceedings before the Committee, the technical nature of the subject matter has obliged it to seek the assistance of a lawyer.

Under these circumstances, the CFE-CGC considers that it is justified in asking for reimbursement of expenses incurred, which amount to EUR 7 000 (appendix 16).

On these grounds, and subject to any that might be the subject of additional memorials, the European Committee of Social Rights is asked:

- to rule that the Act of 20 August 2008 is in breach of articles 1, 2, 3, 4, 20 and 27 and Part V of the revised European Social Charter;

- to order France to pay the CFE-CGC trade union the sum of EUR 7 000 for expenses incurred in connection with this complaint.

VI. Documents in support of the complainant

1. Act of 20 August 2008, No. 2008-789, Official Journal of the French Republic p. 13064, text no. I
2. State of ratification, article by article, by the Council of Europe member states of the European Social Charter and its additional protocols
3. Articles of Association of the CFE-CGC attesting to Mr Bernard Van Craeynest's position as President
4. *Defiscaliser les heures supplémentaires: quelle efficacité pour la croissance?* Interview with Eric Heyer, La Tribune, 16 April 2007
5. *L'emploi salarié au troisième trimestre 2008,* DARES, Première Synthèses Informations, December 2008, no. 51.2

6. INSEE conjoncture, informations rapides, 4 December 2008 no. 324.
7. *Augmentation du temps de travail and comparaison européennes. L'enjeu caché de l'allongement du temps de travail.* Etude FO-Cadres 3 September 2008
8. *Suicide chez Renault: un accident du travail,* L'express, 4 May 2007
9. *Suicides: Renault annonce un plan anti-stress,* L'expansion, 16 March 2007
10. *Le stress au travail: concepts and prévention,* INRS study by Dominique Chouaniere, epidemiologist
11. Dominique Huez, *Le stress au travail est lié au mode de management actuel,* Le Monde, 12 October 2008
12. *Le stress au travail,* Dossier INRS, 23 April 2008
13. *Les heures sup associées à la dégression,* summary of a Norwegian study, JDLE, 23 June 2008
14. *Travailler plus, un facteur de risque,* summary of an American study, JDLE, 18 August 2005
15. Baromètre stress - CFE CGC October 2008, extracts
16. Statement of fees SCP Gatineau-Fattaccini, lawyers at the *Conseil d'Etat* and the Court of Cassation
17. Delegation of CFE-CGC powers to Mr Jean-Jacques Gatineau

Paris, ...

Jean-Jacques Gatineau
Lawyer at the *Conseil d'Etat* and the Court of Cassation